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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action. No. 1408.

THE HANNA FURNACE CORPORATION,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees;

INTERSTATE COMMERCE COMMISSION,
Intervening Defendant-Appellee.

STATEMENT OF GROUNDS OF JURISDICTION.

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States, 1939, the above named appellant files this statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the Decree of Dismissal appealed from herein, as follows:

(a) Statutory Provisions.

The statutory jurisdiction of the Supreme Court to review by direct appeal the final decree here complained of is conferred by Section 47 (a) of Title 28 of the United States Code (Section 210 of the Judicial Code as amended). The court has reviewed similar final decrees in the cases of *United States* v. *American Sheet and Tin Plate Company,*

301 U. S. 402, 57 S. Ct. 804, and *United States* v. *Pan American Petroleum Corporation,* 304 U. S. 156, 58 S. Ct. 771.

(b) Date of Judgment or Decree.

The date of the final decree sought to be reviewed herein is January 11, 1944 and the date upon which the application for appeal was presented is March 6th, 1944.

(c) Nature of the Case.

This action was brought pursuant to Sections 41 (28), 45, 46 and 47 of Title 28 of the United States Code (Act of October 22, 1913, C. 32, 38 Stat. 219 and 220 as amended) to enjoin, set aside and annul a certain report and order entered by the Interstate Commerce Commission on November 11, 1942 in a proceeding entitled Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, said report being sub-titled, 67 Supplemental Report, Hanna Furnace Corporation Terminal Allowance, which report and order directed the defendant carriers to cancel certain tariffs duly filed providing for the payment to this appellant of an allowance for performing at its plant in Buffalo, New York, terminal switching services for the account of the appellee carriers and determining that the payment of such allowance is unlawful in violation of Section 6 (7) of the Interstate Commerce Act (Complaint, paragraph 3, and Section 1 of Demand for Judgment). The District Court held that the order of the Commission is in all respects valid, was within the statutory authority of the Commission, and is supported by the evidence, and dismissed plaintiff's complaint.

(d) The Grounds upon Which it is Contended the Questions Involved Are Substantial.

It is believed by this appellant that the District Court was in error in holding, (1) that the order of the Commission is

supported by substantial evidence; (2) that such order is supported by and not in conflict with the Commission's findings of essential facts; (3) that such order is not arbitrary and discriminatory; (4) that the Commission's determination that the terminal switching services at appellant's plant exceed so-called team-track delivery was not arbitrary and unsupported by law or fact.

Appellant contends that the order of the Commission (1) is not supported by any evidence, (2) is contrary to the evidence, (3) is contrary to the Commission's findings of basic facts and unsupported by the findings of fact made, (4) is arbitrary and discriminatory, and (5) the Commission's definition of what exceeds team-track delivery is purely arbitrary in the absence of any determination by the Commission in this or any other proceeding as to the extent, scope and character of services rendered by the railroads in spotting cars at team-tracks generally.

That the questions involved are substantial is further supported by the fact that a dissenting opinion was filed in this case by one of the judges of the statutory three judge District Court.

(e) Opinions of the District Court.

Copies of the majority opinion of Judges Knight and Clark, and the dissenting opinion of Judge Burke are attached hereto in support of this statement.

Respectfully submitted,

RALPH ULSH,
O'BRIAN, HELLINGS, ULSH & MOREY,
Attorneys for Plaintiff-Appellant.

HARRY D. FENSKE,
JAMES MCEVOY, JR.,
Of Counsel.

APPENDIX.

Majority Opinion of Judges Clark and Knight

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK.

Civil 1408

THE HANNA FURNACE CORPORATION, Plaintiff,

vs.

UNITED STATES OF AMERICA, THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., Defendants.

Appearances: Ralph Ulsh, O'Brian, Hellings, Ulsh & Morey, Attorneys for Plaintiff; Henry D. Fenske and James McEvoy, Jr., of Counsel. George L. Grobe, U. S. Attorney; by Eugene Donnelly, Assistant U. S. Attorney; Edward Dumbauld, Special Assistant to Attorney-General; Edward M. Reidy, Assistant Chief Counsel, for I. C. C. Tom C. Clark, Assistant Attorney-General; Daniel W. Knowlton, Chief Counsel, I. C. C. for U. S. and Interstate Commerce Commission.

Before Clark, Circuit Judge, and Knight and Burke, District Judges.

OPINION, KNIGHT, *District Judge:*

This suit is brought pursuant to statute and under the equity power of this court to enjoin, set aside and annul an order of the Interstate Commerce Commission prohibiting payment to the plaintiff by the defendant-carriers for car switching service performed by the plaintiff within its plant.

Plaintiff (hereinafter called "shipper") is the owner of an industrial plant, situate within the limits of the City of Buffalo, Erie County, State of New York. It produces and ships pig iron and an occasional car-load of other freight. Its inbound railroad line-haul shipments, averaging 10 to 15 carloads daily, consist mainly of coke, but include some coal, dolomite, scrap iron, lime and brick. Its

outbound shipments of pig iron range from 40 to 50 carloads per day. This pig iron makes up about three-quarters of all the line-haul switching service. Save for some miscellaneous materials, that is all of the carload shipments out or in. Raw materials to make pig iron, other than coke, are delivered through the Union Ship canal at the north border of the plant. Among the plant structures and facilities are blast furnaces, engine rooms, boiler houses, shops, storage yards, sheds, brick and various single buildings and equipment, etc., located at various points within the limits of the plant property. The shipper has within the plant 66 standard guage tracks, in total length of 14 miles, with the rails weighing 80 to 90 pounds. It also owns and operates over these tracks seven locomotives, two of which are Diesels weighing 100 tons each and the other two units weighing 55 to 75 tons, some fifty gondola and hopper cars and some other railroad equipment. The plant is served by direct track connnection with the Pennsylvania Railroad Company and the South Buffalo Railway Company (a switching road) and by the Lehigh Valley Railroad Company with trackage rights over the Pennsylvania.

The practice is for these carriers to place and pick up cars on so-called interchange tracks just inside the shipper's plant—one set connected with the Pennsylvania Railway and consisting of eight parallel tracks, and one connected with the South Buffalo Railway and consisting of three parallel tracks. The shipper with its own power switches the cars to any desired location in the plant and returns them to the interchange tracks. The Pennsylvania and Lehigh each makes an allowance of 90¢ per loaded car handled by these railroads in line-haul service. Coke constitutes most of the material brought in by the South Buffalo Railway, and no allowance is made on these shipments, because they come from a company affiliated with the shipper. Deliveries of other materials, however, are brought in to the South Buffalo Railway interchange tracks by several other roads on which an allowance of 90¢ for each line-haul car is made.

The Commission found that the duty of the carriers to perform ended at the interchange tracks and that the al-

lowance made as aforesaid was an unlawful rebate. It purported to act under Section 6(7) (49 USCA) of the Interstate Commerce Act which, among other things, prohibits the transportation of property except in conformity with published tariffs and also provides that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, and charges" specified in the tariffs. This section prohibits such transportation whether or not any discrimination between shippers results. It provides that "the term 'transportation' * * * shall include * * * all services in connection with the receipt, delivery, elevation and transfer in transit, * * * of property transported." 1(3) (Sections 2 and 3 of the Act prohibit rebates which are discriminatory.) No discrimination is claimed here.

A carrier can not deviate from any rate specified in the tariff for any service rendered in transportation. Lowden v. Simonds-Shields Lonsdale Grain Co., 306 U. S. 516; rehearing denied 307 U. S. 649. The form which the rebate takes is of no consequence. Tapline Cases, 234 U. S. 1. Section 15 (13) (49 USCA) permits an allowance only "if the owner of property transported under this chapter (Chapter 1 Interstate Commerce Act) directly or indirectly renders any service connected with such transportation, * * *." In order that an allowance may be made the service performed must be a part of the carrier's duty to perform, and if the service is not a part of the transportation required of the carrier, payment therefor constitutes an unlawful rebate. B. & O. RR. Co. v. United States, 305 U. S. 507; Merchants Warehouse v. United States, 283 U. S. 501. Transportation includes delivery and what is asked as to complete it the carrier must do. N. Y. C. & H. R. R. Co. v. General El. Co., 219 N. Y. 227. So the question here is where "transportation" ends. Is the service performed by the shipper part of the transportation undertaking of the carriers?

In 1931, the Interstate Commerce Commission, upon its own motion, instituted an investigation relating to the payment of allowances by carriers to industries for the performance of terminal switching. This proceeding is known

as Ex Parte 104. Extended hearings resulting in some sixty-seven supplemental reports and involving literally hundreds of industrial plants receiving allowances were held, and out of these came the report of the Commission that industry spotting service under certain conditions was not included in line-haul, and that any allowance to the shipper therefor was illegal and in violation of Section 6, supra. The investigation was particularly directed to the matter of service in spotting cars in large industries. The report is most comprehensive. It sets out certain principles for the practical application of rules as to spotting service. Among these it defined the extent of service required of the carrier. It declared that any "service beyond the point of interruption or interference is an excess of that performed in simple switching or team track delivery" and that "Payment for, or assumption by the carrier of the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of Section 6 of the act." Rules 8, 9 and 10 formulated by the Traffic Executive Association Eastern Territory, July 18, 1929, are incorporated as a part of the report of the commission. These Rules define the extent of service to be performed by the carrier and certain physical conditions which are to be considered as plant interruption or interference. They limit the extent of service required by the carrier to "point of placement or delivery performed without plant interruption or interference," and provide that "if plant interruption or interference is encountered service after such * * * shall be charged to the plant."

It is patent that conditions in various plants differ and that each case must be determined upon the facts established as to it. United States v. Am. Tin Plate Co., 301 U. S. 402. The Commission has found that the interstate line-haul rates published by the carrier in the instant case cover only the delivery and receipt of shipments at interchange tracks and that beyond that point the service is in excess of "simple switching" or "team track" delivery for which the shipper only is liable.

The shipper takes exception to numerous findings of the Commission and makes the contention, in effect, that the

conclusions of the Commission are not supported by substantial evidence and are contrary to the evidence and to the Commission's relevant findings of fact; that the Commission has disregarded uncontradicted evidence which is contrary to its conclusions; that the order of the Commission is arbitrary and discretionary and that the determination of the extent of transportation service to which the shipper is entitled by comparison with service not fixed is arbitrary, unreasonable and legally erroneous.

The Supreme Court has many times laid down rules which are definitely applicable here.

"The credibility of witnesses and weight of evidence are for the commission and not for the courts, and its findings will not be reviewed here if supported by evidence." Merchants Warehouse Co. v. United States, 283 U. S. 501, 508. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Miss. Valley Barge Co. v. United States, 282 U. S. 282, 286. "The findings of the Commission are made by the law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. * * * And in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission, which, in addition to 'knowledge of conditions, of environment and of transportation relations,' has had the witnesses before it and has been able to judge of them and their manner of testifying." Illinois Cent. etc. R. R. v. Inter Com. Comm., 206 U. S. 441, 454. Referring to the last-mentioned case, the Supreme Court in Rochester Tel. Corp. v. United States, 307 U. S. 125, which case went up on appeal from a three-Judge Court in this District, said: "Recognition of the Commission's expertise also led this Court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safe-guards. From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S.

426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." Vide also: I. C. C. v. Union Pacific R. Co., 222 U. S. 541. In view of the investigations made by the Commission in the matters of concern here, the "knowledge of conditions, of environment and of transportation relations" so acquired has additional weight.

The rule is too well settled to admit of any doubt that a finding by the Commission, supported by substantial evidence, must be sustained.

The defendant-carriers from in or about June 2, 1921, until November 11, 1942, published and filed terminal allowance tariffs which provided compensation to the shipper at the rate hereinbefore specified. On November 1, 1941, defendant carriers filed with the Interstate Commerce Commission tariffs to become effective April 19, 1942, providing for cancellation of the aforesaid terminal allowance tariffs. In the investigation aforesaid relating to terminal service of carriers and instituted by the Commission in or about the years 1931 and 1932, considerable testimony was taken specifically directed to this shipper. It included thirty pages of the record. In 1942 the Commission of its own motion re-opened the proceedings in respect to the terminal services of the plaintiff's plant, and further testimony was taken and that is included in the record before this court.

The fact that the tariffs filed permitted the allowance for a long period of time has no bearing. Merchants Warehouse Co. v. United States, supra; I. C. C. v. Louis & Nash. R. R., 227 U. S. 88; L. & N. R., 235 id.; Assigned Car Cases, 274 id. Any significance which might be thought to be attached to it is eradicated when the magnitude of the work of the Commission in its investigation following Ex Parte

104 is considered. Certain of the allowances considered in the Tin Plate case had been made for a longer period of time than here.

The I. C. C. said in Ex Parte 104 that only simple switch or team track delivery was required and that when "interference or interruption" prevents such delivery, services beyond such point are in excess of simple switching or team track delivery. This finding in the report was sustained in U. S. et al. v. Am. Tin Plate Co., supra. That case was a consolidation of six several cases, each involving the question of the right to allowance for spotting services. The court there, in part, said: "It is sufficient now to say that in every case the Commission found, upon sufficient evidence, that the cars were, in the first instance, placed upon lead tracks, interchange tracks or sidings and subsequently spotted from these tracks; in each instance the spotting service involved one or more operations in addition to the placing of the car on interchange tracks, such as moving it to plant scales for weighing, or some additional burden, such as conformance to the convenience of the plant, supply of special motive power required by the Plant's layout or trackage or some other element which called for excessive service greater than that involved in team track spotting or spotting on an ordinary industrial siding or spur. We are unable to say that the findings in respect of the individual plants lacked support in the evidence." The expression "simple switching" defines itself, but there seems to be some confusion as to the meaning of "team track" switching or delivery. Team track switching or delivery has been described by counsel for the government as meaning putting cars out on a spur belonging to railroad to which there is access by wagons or other conveyances and in which the unloading must be made at convenience of the railroad. This is in distinction from a simple switch placement which means the placing of a car on a siding leading to a plant. However, the general Report of the Commission and the rules included therein define what is in excess of team track delivery and that is "when a carrier is prevented at its ordinary operation convenience from reaching points of loading or unloading within a plant, without interruption or interference

by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances." So it is unnecessary to find a definition for "team track" delivery if we know what excess of "team track" delivery is.

The main basis for the Commission's order is that there is such interference and interruption of carriage as obviates the necessity of delivery beyond the interchange tracks. What are some of the undisputed facts?

A blue print in evidence shows in detail the numerous and extensive plant buildings and their facilities; a net work of 66 Standard railroad tracks, 14 miles in total length, connecting directly or indirectly with these buildings and 6 separate points where materials are loaded or unloaded. All these are enclosed in a plot ranging from 800 to 1300 feet in width and 3300 feet in length.

For the first six months in 1930 the shipper's rail crew shipped 20,507 loaded cars. Of these 12,875 were switched in intra-plant service; 7,632, or only 37%, were interchange cars and of these 5,326 were interchange loads moving from and to points in the Buffalo Switching District and 2,306 were interchange line-haul loads on which the allowance aforesaid was made.

On the average 113 loaded cars were switched daily, the daily engine hours required were 35½, and this switching was done twenty-four hours each day. Altogether there were several hundred switch movements daily. One locomotive of the defendant's seven was constantly in use. The computed cost of service performed by engines' crews averaged $1.73 per loaded car. It is undisputed that the 1930 period is fairly comparable with the like period of 1942.

While there is no direct evidence as to the movement of particular materials from the unloading points to the places where utilized, the location of plant buildings and facilities, the number and location of the tracks, the fact that the plant moved daily twice as many loaded cars as were included in pig iron and coke deliveries in and out, the large number of cars switched exclusive in plant service, and the nature of the materials and the plant products are evidence

from which the Commission could find what the movement of much of these materials was. For instance, the Commission could well find that fire brick had to be moved from the designated unloading point to the furnaces at a considerable distance and in locations on different tracks; that lumber for plant building or for use within the various structures had to be moved from two unloading points to these structures; that coal and coke had to be moved from the coal and coke stock piles to different furnaces on different tracks. The slag pits are located near the trestle. Admittedly the ladles of molten liquid had to be moved from the furnaces in the northeast part of the plant to the pig casting house, and this could only be done by movement over several tracks and thus several switches. This by-product was moved by the Buffalo Slag Company out of the shipper's plant to the slag company plant. Removal from these pits had to be made over different tracks and by several switch movements. Considering the total product of pig iron, the amount of slag must have been considerable. As the evidence shows, coke, which was largely brought in by the South Buffalo railroad, was moved from the interchange tracks numbered 3, 4 and 5 easterly to track 1, thence west to the interchange tracks directly connected with the Pennsylvania; west over the interchange tracks to the lead track B from the Pennsylvania and then northeasterly to the coke and scrap unloading point. It will be seen that this movement necessarily involved at least three switching movements and at least two more if track 16 was being used for the unloading or removal of coal. This can well be seen to cause interference. Empties from any of these points, of course, necessitate a re-tracing of the movements as stated. Other line-haul care, from different railroad lines to the South Buffalo interchange tracks, had to be delivered at different points in the plant. These deliveries and returns could only be made by several switch movements to reach the spotting points. Further, cars other than empties for pig were delivered at the S track exchange for certain materials for use at various points in the plant.

The evidence shows that it costs the shipper $1.73 per line-haul car, as above stated, while it receives only 90¢

from the carrier. There is proof that it would cost the carrier much more than the present allowance to spot these cars. Indeed, a representative of a railroad testified that the spot switching is "Much more costly than yard operation." There is evidence that the railroads get "$4 or $5 a car as their total revenue on the switch traffic, or something like that." There is proof that the allowance agreement was entered into for the convenience of both the shipper and the carrier. There is proof that the shipper has reason why it prefers to spot the cars, and the Commission can conclude what they are. These and many other factors are significant as going to show interruption of service if the carrier spots.

Mr. Frederickson, shipping clerk of the shipper and its principal witness, testified: "Q. * * * if the industry power gave way to the carrier, gave it the right of way, would not the effect be to delay your industrial operation to some extent? A. You wanted to know if there would be interference either with the railroad or plant operation of its locomotive? Q. Exactly, either against the railroad power or against the industrial power by the railroad power? A. I don't think there would be, but on account, probably the layout of the tracks, might be the railroads would be free to do their work without interfering with plant operation." Again he testified that the cars on interchange tracks are intermingled with cars which are shifted from one point in the plant to another, and in answer to the question as to whether you would have to segregate the line-haul carrier cars from cars which are shifting from one to another he answered: "Well they would have to be separated if that is what you mean * * *. I don't think they would be greatly mingled. They might be on the same track." In answer to leading questions by shipper's counsel, the witness did testify, in effect, that there would not be interference with plant movements through spotting by the carriers. The effort was made to show how this could be avoided, save by holding the intra-plant cars back while the carrier was spotting. The most liberal construction that can be placed upon his testimony is that by the stoppage of intra-plant cars in movement deliveries could be made to certain spotting points without interference. Of

course, this obviously could be a condition in any industry, but it totally disregards the operating needs of the plant. The operating needs of this plant are well shown by the statement of the shipper's counsel that "We have seven switch engines working, because there is a lot of intra-plant manufacturing operation requiring movement of cars." There is proof also that intra-plant switching in addition to interchange switching is necessary.

Empties via the Pennsylvania are delivered once or twice daily on the eight track interchange. There is no regular time of delivery. All the railroads had to do was to keep these tracks supplied with sufficient cars. The shipper, as its necessities required, spots the cars for pig iron shipment on the three tracks opposite the pig casting machines. After these cars are shifted around by the use of shipper's car pulley, they are loaded and shifted back over one or more of the tracks to the loading scales. When loaded they are moved to the receiving and delivery tracks, thence east and then west back to the eight track interchange tracks. Spotting and return of the loaded cars, as will be seen by the blue print, entail movements over numerous different tracks and turning of numerous switches.

While it is true that cars can be spotted directly from the Pennsylvania to the pig casting machine, without interference or interruption, save for a few switching movements, and provided the tracks are clear, it cannot be so done to meet the ordinary requirements and needs of the industry, and we believe that what those needs are the Commission had the right to determine, not alone by the blue print, but also by the nature and volume of the business shown by the evidence. The Commission may well have found that the equivalent of "simple track or team track delivery" could not be made from the Pennsylvania to the pig machine, because there is space for not to exceed nineteen cars at that point, that at least three deliveries of pig empties would be required each day, that the shifting of the empties and loaded cars in order to move the loaded cars to the weighing scales would interfere with other sections, that Lehigh and Pennsylvania cars would be intermingled, that lime and dolomite cars off the Pennsylvania would have to be spotted either by movement

through the three tracks at the pig machine or around through one of the eight exchange tracks; that any movement of loaded cars west and east to these tracks would involve several movements and would interfere with deliveries from the South Buffalo; and, further, that shifting of loaded cars from the pig loading point back east to the scales would interrupt the movements of empties and loads. The point of weighing is of special significance. Weighing is for the benefit of the shipper. Again, there is a pig storage along side of track 14, and unloading pig there would interfere with deliveries to and from the pig machine. It is asserted that loaded cars could be moved to the Pennsylvania from the receiving and delivery tracks 6 and 9, but such would both interfere with inbound deliveries and require several switch movements. Particularly is this so since Lehigh and Pennsylvania cars have to be separated. Any spotting from the South Buffalo to any of the points of delivery would involve numerous switch movements and carriage over numerous tracks. A single carrier delivery would lessen somewhat interference and interruption, but, because of the large intra-plant movements, other than line-haul, it would not obviate interference at the pig unloading point. While it might be possible to so re-arrange the trackage within the plant that a single carrier could spot without interference anywhere, the Commission has passed on the conditions as then existing.

It is urged that the necessity of opening and closing switches does not constitute interference or interruption of service. Certainly that is a thing which is properly considered as part of the movement over numerous tracks and under conditions which are shown here. As General Electric Co. v. N. Y. C. & H. R. R. Co., 14 I. C. C. 237, held, carriers "cannot be called upon * * * to make deliveries through a network of interior switching tracks. * * * Their obligation as common carriers involves only a delivery and acceptance of carload shipments at some reasonably convenient point of interchange." Terminal allowance to St. Louis Coke & Iron Co., 85 I. C. C. 591.

The record does not disclose whether the engines of the Pennsylvania used in its deliveries and weighing 123 to 138 tons each could be operated upon the trestle, though

they could be used on the other tracks. It does appear that the Pennsylvania has smaller locomotives which it uses in switching cars over tracks which will not accommodate heavier engines. The shipper employs engine- weighing from 55 to 100 tons and the Lehigh uses Diesels weighing 100 tons.

An examination of the decisions of the Commission in the industries considered in United States v. Am. Tin Plate Co., supra, will disclose that each of these is fairly comparable in its material facts with the instant case. We believe there is little in the decisions in these cases showing specifically what the intra-plant movements were, but there, as here, the conclusions in this respect have been largely drawn from description of the nature of the industry, the layout of its tracks, and the extent of operation over these. It is believed that the decision in that case is controlling here, and in support of this view we refer particularly to that part of the opinion hereinbefore quoted.

We are further confirmed in our opinion by the case of United States v. Pan American Corp., 304 U. S. 156:

> "We have examined the record and are of opinion that in each case there is substantial evidence to support the Commission's findings. No useful purpose will be served by a detailed recital of the evidence and it must suffice to say that, while the conditions in the various plants differed, in all of the cases the Commission had before it maps exhibiting the character and extent of the plant trackage, its relation and accessibility to the main line tracks of the carriers concerned, and proofs as to the volume and nature of intra-plant car movements, the amount of engine service required and other relevant facts. The value and weight of the evidence given by railroad and plant executives, and the inference to be drawn from it, were for the Commission. In some instances the inconvenience and delay to the carriers in performing plant services were more obvious than in others but we are unable to say that in any case the Commission's orders were not based upon susbtantial evidence."

The exceptions to the Findings of the Commission are disallowed. The order of the Interstate Commerce Commission prohibiting the payment of an allowance to the shipper by the defendant-carriers for switching service performed by the shipper within its plant is sustained upon the ground and for the reason that there is substantial evidence to support the Commission's finding that the carriers' service for transportation was complete upon the delivery of cars to the interchange tracks and that spotting within the plant is not included in the service for which the line-haul rates were fixed.

Judgment is therefore entered for the defendants.

December 3, 1943.

Charles E. Clark, United States Circuit Judge; John Knight, United States District Judge; —— ——, United States District Judge.

(Note: Ex Parte 104, 209 I. C. C. 11; and Hanna Furnace Corp. Terminal Allowance, 253 I. C. C. 613.)

DISSENTING OPINION OF JUDGE BURKE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

THE HANNA FURNACE CORPORATION

vs.

UNITED STATES OF AMERICA, et al.

The order of the Commission must find support in the evidence on at least one of the following grounds: that the plaintiff's trestle would not support railroad locomotives, that opening and closing of switches would constitute interference, or that intra-plant operation would cause interruptions with car spotting movements if conducted by the railroads. There is no evidence and no finding that the trestle would not bear the weight of railroad locomo-

tives. There is no basis in precedent for sustaining such an order of the Commission on the ground that opening and closing of switches constitutes an interference in car spotting movements. It is inherent in the operation. There is no evidence that the number of switches required to be opened or closed would be burdensome.

The plaintiff and its predecessor have for twenty-two years performed their own car spotting under an allowance from the railroads. The only evidence as to the manner of car spotting that was before the Commission related to how it had been done by the plaintiff under those circumstances. Plaintiff had the right to conduct those operations in its own way and suited best to its own convenience. It does not follow that it would have to be done in the same manner if the service were performed by the railroads. The Commission had before it a map showing the layout of plaintiff's tracks and buildings and evidence as to the volume of car movements conducted within the plant. On that evidence it has based its findings that car spotting, if conducted by the railroads, "would be marked by frequent interruptions and delays occasioned by intra-plant switching interference." The only evidence on the question of possible interference with car spotting movements, if conducted by the railroads, was the testimony of Frederickson, assistant to plaintiff's general superintendent, who was competent to testify as to the requirements of the industry and who had knowledge of the way plaintiff's business was and could be conducted. He testified regarding the requirements and manner of operation of defendant's plant. He said that there would be no interference by intra-plant traffic with car spotting movements and explained that the plaintiff would not have to conduct its car movements at the same time and in the same location where the railroads would be performing car spotting service. The Commission has rejected this testimony. There is no more ground for holding that there would be interference on the basis of the Commission's expert knowledge, without evidence, than there would be for holding that the plaintiff's trestle would not support the weight of railroad switching engines on the basis of the Commission's expert knowledge,

without evidence. In United States vs. Pan American Petroleum Corp., 304 U. S. 156, the Court pointed out that the Commission had before it maps exhibiting the character and extent of the plant trackage, its relation and accessibility to the main-line tracks of the carriers concerned and proofs as to the volume and the nature of intra-plant car movements, the amount of engine services required and other relevant facts. I take this to mean that, included in the proofs as to the nature of intra-plant car movements and other relevant facts, there was evidence not only as to the materials being carried in intra-plant car movements but also as to the time when it was necessary in the industry to conduct such car movements.

I think the Commission's finding that car spotting, if conducted by the railroads, "would be marked by frequent interruptions and delays occasioned by intra-plant switching interference" is not supported by substantial evidence, and is contrary to the only evidence on the subject in the case and, as such, is beyond the power of the Commission. I. C. C. vs. Louisville and Nashville Railroad Co., 277 U. S. 88. I would give judgment for the plaintiff.

HAROLD P. BURKE,
United States District Judge.

Dated: December 3, 1943.

Office - Supreme Court, U. S.
FILED
JUN 5 1944
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 132

Supreme Court of the United States

October Term, 1943.

THE HANNA FURNACE CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO AFFIRM UNDER RULE 12.

RALPH ULSH,
HARRY D. FENSKE,
JAMES McEVOY, JR.,
Counsel for Appellant.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Supreme Court of the United States

October Term, 1943.

THE HANNA FURNACE CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO AFFIRM UNDER RULE 12.

This case is pending on direct appeal under Section 47 (a) of Title 28 of the United States Code from a final decree of a statutory three-judge United States District Court for the Western District of New York, dismissing the appellant's complaint in an action brought to enjoin permanently and set aside an order of the Interstate Commerce Commission which directed the defendant carriers to cancel tariffs under which they paid the appellant an allowance for performing for their account car spotting at the appellant's blast furnace plant in the City of Buffalo, New York.

1. The questions raised on appeal.

This motion to affirm made by appellees, United States of America and Interstate Commerce Commission, is filed under Rules 12 (3) and 7 (4) on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The principal question raised by this appeal is whether or not the Commission had before it substantial evidence upon which to base its order. The District Court divided on this question, two judges holding that there was substantial evidence to support the order of the Commission and one judge holding, in a dissenting opinion, (a copy of which is hereto appended) that there was no evidence to support the order. It would seem elementary that if the judges of the trial court differ two to one and reach opposite conclusions as to whether or not there was substantial evidence before the Commission the question raised on an appeal is not unsubstantial.

Appellees' argument is that this court has in six cases affirmed similar orders arising out of this same *Ex Parte* 104 proceeding before the Commission and therefore there can be no merit to appellant's case, notwithstanding that appellant was not a party to any of those cases and this court did not have before it the facts in connection with the terminal operation at appellant's plant. Those six cases have no bearing at all on the question of the sufficiency of the evidence before the Commission in the present case. This court, in considering the general tests of the measure of terminal switching to which a shipper is entitled enunciated by the Commission in its main report in *Ex Parte* 104 (209 I. C. C. 11), was careful to point out in the first case *(United States v. American Sheet and Tin Plate Company, et al.*, 301 U. S. 402) that each case must be decided on its own facts.

The duty of a carrier with respect to delivery, as declared by this court in the *American Sheet and Tin Plate* case, is "to deliver freight in its freight depot or at team tracks or on sidings or spur tracks owned by an industry." It is this appellant's contention that what it asks of the

carriers in service or by allowance therefore does not exceed the service defined by the Court in the *American Sheet and Tin Plate* case thus:

> "The practice has come to be uniform that in delivering a car on a team track the carrier will spot the car at a point where merchandise of the class contained in the car is usually and most conveniently unloaded; thus there are particular team tracks or points where fruit and vegetables, furniture, etc., etc., are constantly loaded and unloaded and cars are spotted accordingly. In the analogous situation where an industry's warehouses or other facilities are located at given points on a spur or side-track, the carrier holds itself out to spot the car at the point where it is needed for loading or unloading, as a warehouse door, a scrap pile, etc., etc."

The Commission in *Ex Parte* 104 stated that if certain circumstances or conditions exist at any industrial plant the carrier is relieved from its obligation under the line-haul rate from performing the completed spotting service and its duty to the industry comes to an end when it places freight cars at so-called convenient points of interchange. These prescribed conditions are: (1) where the performance of completed service is prevented by the desire of the industry not to have the railroads perform it; (2) where the performance of the completed service is prevented by physical conditions in the layout of the plant and the side-tracks serving it such as the existence of extreme curvature, narrow gauge tracks, light weight rails or unsafe structures; and (3) where, if the railroads were to perform the completed service they would encounter interruption and interference from the industry's operations in the plant so that they could not complete the spotting service at their own operating convenience. In all of the supplemental reports and orders issued by the Commission in this *Ex Parte* proceeding that have been reviewed

by the courts the existence of one or more of these factors has been proved.

In the case of *United States v. Wabash Railroad Company* (decided March 27, 1944) the Court, after referring to the tests prescribed by the Commission in *Ex Parte* 104 to determine whether spotting service exceeds the transportation obligation of the carriers, said:

> "The application of such a test obviously requires an intensive study of traffic conditions prevailing at the particular plant at which the spotting service is rendered."

Assuming that the tests prescribed by the Interstate Commerce Commission are correct they must be applied to the facts as they exist at the appellant's plant. The appellant is entitled to have this court review the evidence before the Commission in order to determine whether or not the tests have been properly applied and whether or not there is substantial evidence that under the application of the tests the spotting service at appellant's plant exceeds that to which it is lawfully entitled.

Unless the evidence before the Commission in this case substantiates the existence of one or more of the conditions hereinabove enumerated then the appellant, under the line-haul rates that it pays, is entitled to complete terminal service to the points of loading and unloading within its plant.

The Commission has not found or determined either that appellant does not desire the carriers to do the spotting or that the carriers were prevented from performing the completed service because of the existence of any physical impediments at appellant's plant.

Appellees in their motion assert that appellant prefers to perform its own spotting service. The record shows the contrary. It was stipulated by counsel at the trial that the allowance paid appellant by the railroads, established by published tariffs in 1921, was made after a complaint filed with the Commission by the industry demanding that the railroads be required either to perform the spotting in the plant or pay the industry for performing it. At the hearing before Examiner McGrath in Buffalo on February 4, 1942, counsel for appellant stated on the record:

> "It is our position in the proceeding * * * that if they (the carriers) do not pay the allowance then they should perform the service; and we would ask the Commission in this proceeding to make an alternative order, either to pay the allowance or perform the service, and the presentation of this witness is for the purpose of setting forth what service we feel we are entitled to receive."

The Commission in its report in the present case held as the sole ground of its order:

> "In fact the record is persuasive that railroad switching of line-haul cars in the plant would be marked by frequent interruptions and delays occasioned by intra-plant switching interference as well as the numerous stops to open and close switches incident to operation over so extensive a network of plant tracks.
>
> "From the evidence concerning the extent and character of switching operations from and to loading and unloading points on the furnace company's complex system of industrial tracks, it is apparent that such operations exceed the equivalent of team-track or simple switch placement, and that they constitute a service which respondents are not obliged to perform or to pay for under their line-haul rates."

The principal issue presented by the appeal is whether there is substantial evidence to support these findings.

If, as Judge Burke held, there was no evidence to su
port these findings, the appellant respectfully submits it
entitled to have this court set aside the order of the Co
mission. In determining this question the court is no mo
concerned with the decisions that it has rendered in oth
terminal allowance cases than it would be concerned wi
any other decisions in which it has either affirmed
reversed the Commission. The question can only
decided by a review of the evidence that was before t
Commission in this case. The Court cannot properly d
termine whether the order of the Commission was su
ported by substantial evidence on a motion to affirm, wit
out considering all the evidence, and giving appellant t
opportunity to present that evidence and argue the ca
before it.

2. The evidence on interference or interruption.

In considering the sufficiency of the evidence before t
Commission it must be remembered that this is not an a
versary proceeding. It is a proceeding instituted by t
Commission on its own motion to inquire into the validit
of tariffs observed by the appellant and the carriers fo
over 20 years. The burden was not on the appellant or t
carriers serving its plant to prove the tariffs were vali
but upon the Commission to prove that they were invali
In an *Ex Parte* proceeding the Commission has almost u
limited power to subpoena witnesses. It can send its i
vestigators into the field to study the conditions existin
at any plant and place these investigators upon the stan
to report upon the results of their study. It has the powe
to call expert witnesses who could testify as to the prope
method of operation of a blast furnace plant and the ha
dling of its transportation problems. The Commission i
this case held two hearings; one in the Fall of 1932, an

the other in February 1942. Six witnesses were called, who testified at one or both hearings. These witnesses were Frederickson, who in 1932 was the shipping clerk at appellant's plant and in 1942 assistant to the general superintendent; Glynn, Raughley and Reed of the Pennsylvania Railroad; Haines of the Lehigh Valley Railroad; and Treggesser of the South Buffalo Railway. Two exhibits were introduced. One was a map of appellant's plant, showing the track layout in reference to the buildings and structures located on appellant's property and the track connections with the carriers. The other consisted of copies of three allowance tariffs. All the witnesses were called by the Commission and questioned by its examiners and attorneys as well as by counsel for appellant and the carriers.

Frederickson was asked to describe the nature of appellant's business, the commodities received and shipped by freight, the volume of traffic handled in line-haul and intra-plant movements over a six months' test period in 1930, the manner of operation by the carriers and the industry under the allowance tariffs, and the manner in which the spotting would be done by the carriers if the tariffs were cancelled and the carriers furnished the completed terminal service to the points of loading and unloading within the plant. He testified that there are only 7 points in appellant's plant where cars in line-haul traffic are placed for loading and unloading. The Commission has found in its report that every one of these seven points is directly and easily accessible from, and connects directly with, the tracks of the carriers serving the plant. Frederickson testified that the industry can give the carriers the necessary instructions as to where the cars are to be placed and the railroads can then spot the cars at those places by direct movement at their own convenience. Thus, if the carriers

were to perform the completed spotting service it would not be necessary for the carriers to switch the cars first to the tracks now used as interchange tracks, and thereafter make a second spotting movement to the points of loading and unloading.

The fact that the carriers would not be required to use the interchange yard and make two movements to spot cars is one of the important features which distinguishes this case from all of the other cases that have been reviewed by this court, where, in each case, it was found that the cars must first be brought into an interchange yard and then switched to the points of loading and unloading. In those cases the Commission found that the spotting service beyond the interchange tracks could not be performed at the convenience of the carriers but that such movements must be subordinated to the desires of the industry. In other words, in those cases the carriers could not perform the service in one uninterrupted movement from the point of connection with the industry's track to the points of loading and unloading.

In the most recent case decided by this court, *United States v. Wabash Railroad Company*, the court emphasizes the importance of the existence of this double movement as constituting one of the chief reasons why an industry is not entitled to the completed service.

The question then is, in spotting the cars directly from the points of connection with the carriers' rails to the points of loading and unloading in appellant's plant, would the carriers encounter interruption or interference from plant operations? If the carriers encountered such interference or interruption, it could be only because the appellant would have to use the same tracks at the same time that the carriers would be using them.

The only direct evidence on this question is, as appellees concede, the testimony of Witness Frederickson. He testified that the plant operations would not require the industry to use the tracks used for spotting at the times when the railroads would be spotting cars and that no interference or interruption would be encountered.

Outbound shipments consist of pig iron. The volume is from 40 to 50 cars daily at maximum operation and includes approximately 75 per cent of all of the line-haul spotting service required from the carriers. In explaining that no interference or interruption would occur, Frederickson testified that spotting service for shipments of pig iron would take place on three tracks located in the southerly portion of appellant's plant, which tracks connect directly with the southerly track of the Pennsylvania Railroad leading into the appellant's plant, over which lead track the Lehigh Valley has trackage rights. These tracks are adjacent to and serve the pig-casting machine and are used primarily and almost exclusively for the purpose of loading with pig iron cars that are to be shipped out of the plant. It is not necessary for the carriers to spot cars on these tracks at any particular point as there is a car-puller in the vicinity of such tracks which spots the cars under the loading device and removes them as they are filled. The only service required on these tracks from the carriers would be to fill them with empty cars three times, possibly on occasion four times, in 24 hours and to remove the loaded cars. It is established by the evidence that the Pennsylvania and the Lehigh Valley make three to four deliveries of cars daily under present practice, and therefore this is no increase in service. The cars would merely be handled to and from the three tracks serving the pig machine instead of the so-called interchange tracks. In performing this service Frederickson said that the carriers

would not encounter any interruption or interference from plant operations because it would not be necessary for plant engines to operate over these same tracks.

Inbound carload shipments consist of from 10 to 15 cars per day, which would be spotted on six tracks, generally located on the fringes of appellant's plant remote from any manufacturing operations. Frederickson stated that the carriers would not encounter interference or interruption in spotting cars on these tracks because it would not be necessary for plant engines to operate over these tracks at the same time as they were being used by the carriers.

The railroad witnesses were not questioned to any extent about how they would perform the service if they were called upon to do so. Witness Glynn of the Pennsylvania Railroad testified:

> "There are not to my knowledge any obstructions or other difficulties that stand in the way of our rendering this service."

Witness Haines of the Lehigh Valley Railroad confirmed this testimony from the standpoint of his railroad.

Appellees state in their motion, page 6:

> "The only testimony that intraplant switching would not interefere with line-haul switching was by appellant's witness Frederickson. But, as the District Court stated 'the most liberal construction that can be placed upon his testimony is that by the stoppage of intraplant cars in movement deliveries could be made to certain spotting points without interference.' "

Frederickson was acquainted with appellant's plant and its operations. He was speaking with the background of that knowledge. His testimony was based upon the man-

ner in which the plant operates and the service that would be required from the carriers if they were to perform the completed spotting service to the points of loading and unloading. No other witness testified on the subject. He was neither contradicted nor impeached. He was qualified far beyond the members of the Commission to state the manner of operation if the railroads with their own power performed the line-haul switching in the plant. His testimony was ignored by both the Commission and the Court. To avoid the effect of the testimony it is said on this motion:

> "He was speaking concerning a hypothetical mode of operation which had never been adopted at this plant. This was the language of hope rather than of experience which the Commission was entitled to weigh and refuse to accept at face value."

The Commission is certainly not at liberty to refuse to accept the uncontradicted testimony of this witness, testifying at the instance of the Commission, where most of his testimony was elicited by the Commission's examiner or counsel, and substitute in its place unsupported inferences and conclusions.

Appellees condemn Frederickson's testimony on the charge that it sets forth a purely hypothetical mode of operation. However, Frederickson's testimony is no more hypothetical than the finding of the Commission that if the carriers were to perform the service they would encounter "frequent interruptions and delays occasioned by intra-plant switching operations."

There is not in the record before the Commission one word of testimony or a single fact or circumstance from which a valid finding can be made that the appellant would

need to operate its locomotives or cars or conduct other operations on the tracks on which line-haul cars are placed for loading or unloading at the same times as the railroads would be spotting the cars in the plant. No such finding was made by the Commission. Without such a finding there can be no legal determination, such as the Commission made, that spotting of cars by the railroads would encounter interference from intra-plant car movements.

Appellees contend that there is abundant circumstantial evidence to support the conclusions reached by the Commission.

The circumstances upon which the appellees rely are principally that Frederickson testified that there are several hundred intra-plant car movements daily; that there is a movement of coke through the plant, a movement of slag from the blast furnaces out of the plant, and a movement of molten iron within the plant; and that the map shows that there is a yard for the storage of pig iron adjacent to the tracks on which cars are loaded with pig iron. From the mere existence of these conditions it is asserted that the Commission can infer that the railroads would encounter interference in car spotting were they to perform that service. Admitting the existence of these conditions, there is no evidence whatever in the record that these operations or car movements take place in the appellant's plant at times, on tracks and under circumstances which would conflict with the spotting of cars by the railroads or cause any interference whatever. Without such evidence the existence of the conditions referred to does not support a finding of interference because they have no inherent significance with respect thereto.

There is, thus, on the one hand a complete absence of evidence that the activities, which it is claimed would interfere with car spotting by the railroads, would in fact interfere, and on the other hand, Frederickson's testimony that none of the plant operations would interfere with railroad spotting because they would not have to take place on the same tracks, at the same time that the carriers were using them for spotting, or are carried on in parts of the plant where no spotting is done.

The only other evidence in the record is the plant map. This map, explained by Frederickson, shows that there are 66 tracks, 14 miles in total length.

The findings of the Commission show that only 12 of the 66 tracks would be used for the spotting of line-haul cars, or approximately 1/5 of the total trackage in the plant. Frederickson's testimony and the Commission's findings show that the volume of line-haul transportation was approximately 1/6 of the total movement of cars within the plant during the test period.

The map alone cannot refute the positive testimony given by Witness Frederickson, particularly where it shows the existence of 54 tracks used exclusively for plant movements and over which no carrier operation is required. Nor is the map evidence that the plant activities and car movements occur at such times and on such tracks as to interfere with car spotting by the railroads.

The Commission has substituted its judgment and opinion for the uncontradicted testimony of a qualified witness who is familiar with the plant operations and the needs of this industry, and who testified as to what they are. It has met a lack of proof that plant activities would

interfere with spotting by the railroads by its own inference, opposed to the affirmative proof, that interference would result because the plant operations occur. Appellant submits that the rule requiring an order of the Commission to be based upon substantial evidence demands a greater showing than has been made by the Commission in this case.

The only other point made by the Commission, to support its determination that interference or interruption would exist, is that the carriers in reaching the points of loading and unloading would be required to open and close certain switches. In finding that stops to open and close switches amount to an interruption or interference the Commission injects something entirely new into these terminal allowance cases. Nowhere in the general report, the rules set forth in the appendix thereto, in any of the supplemental reports issued in this proceeding, or in any other case involving the right to spotting service, has the Commission once referred to the opening or closing of switches. There is no evidence in the record that the number of switches required to be opened or closed would be burdensome, or is in excess of the number encountered in team-track spotting. In fact, no witness was asked any questions about the switches. The opening and closing of switches is inherent in switching operations, whether on public team-tracks or private sidings, or elsewhere. In the absence of some finding that the number of switches was burdensome or greater than that usually encountered in performing service on public team-tracks and private sidings, made upon evidence presented before the Commission, there is no basis for the denial of service to appellant on the grounds that the opening and closing of switches at its plant constitutes interruption or interference with carrier spotting.

3. The evidence shows that the service involved in spotting at appellant's plant does not exceed that of so-called team-track or simple switch placement.

When the Commission in its General Report in *Ex Parte* 104 described the service in team-track delivery as the measure of the service to which an industry is entitled, it recognized the difficulty involved in a determination of whether the service at any industry in fact exceeds that on team-tracks. The Commission's solution of this dilemma was stated in its General Report as follows:

> "We are inclined to the belief that this argument has merit, but this assumption does not conflict with our view, which is that a determination of what constitutes a carrier's duty with respect to the equivalent of team-track or simple switch placement can readily be ascertained at any individual industry by experienced railroad operating men or committees if honestly performed without consideration of traffic reasons."

In determining whether or not the service at appellant's plant exceeds team-track placement the comparison properly to be made is a comparison between service at appellant's plant and service on team-tracks in the Buffalo switching district, for the reason that the line-haul freight rates on shipments, both originating and terminating within the Buffalo switching district, are concededly made by the carriers after taking into consideration the cost of terminal services performed in the Buffalo district.

The only evidence as to the comparison between the service given at appellant's plant and the service generally given on team-tracks in the Buffalo switching district was the testimony of Jasper N. Haines, Executive Assistant to the President and formerly General Manager of the Lehigh Valley Railroad Company. This witness was a

man with forty-four years of railroad operating experience, familiar with traffic conditions generally in the Buffalo switching district and familiar with the conditions at appellant's plant, having recently made an examination of the switching conditions there.

Witness Haines testified that the main break-up yard of the Lehigh Valley in the Buffalo Switching District was the Tifft terminal, at which yard incoming trains were broken up and the cars classified according to the team-tracks or industrial sidings to which they were consigned; that cars consigned to appellant's plant came into this terminal; and that appellant's plant is approximately a mile and four-tenths from the Tifft terminal, whereas some of the team-tracks within the Buffalo district were 14 miles from this terminal. The Examiner did not require the witness to produce any figures showing the cost of team-track service on any of the team-tracks of the Lehigh Valley in the Buffalo switching district. He was satisfied to ask only for the general comparison hereinafter quoted.

At the hearing in Buffalo on February 4, 1942, Examiner McGrath questioned Witness Haines at length, as follows:

> "Q. We are considering the specific instance we have here. What is your opinion as to how that service, if you should be called upon to provide it yourself, would compare with the service you now perform in making deliveries to team tracks in the Buffalo switching district?
>
> A. You would go through substantially the same performance at the Hanna plant as you would at a team track. You would spot the car at the designated point for loading or unloading.
>
> Q. I realize that. What is the relative measure of the service that would be required in making such de-

liveries, of spotting on the one hand, as compared with what you have to do and what you do do in making deliveries and receiving shipments from team tracks?

A. That is car for car—

Q. I am not speaking now with respect to what you are doing at the present time, but what you would have to do if you spotted the cars at various points within the plant?

A. Yes, taking it car for car the service would be substantially the same as on a team track. It might be less than on the team track, particularly where you come in contact with these combination team tracks and industry tracks along the railroad out in the country. I mean generally in the cities that is not true, but you have a combination team track and industry track, and frequently you have got to pull out cars to place your individual cars and then set them all up again; so, the placing of cars on the team track in practice is not so simple as it appears or is frequently spoken of. I think generally people think that when you spot a car on a team track you open the switch and kick it in. That isn't so.

Q. Can you give us the benefit of your views with respect to the particular situation in Buffalo here?

A. Well, you find those combination tracks, generally out along the road. Generally the team tracks are pretty well established and separate from the industry tracks. I should say, compared with the team tracks in Buffalo car for car, and the movement, if we were doing the spotting at the Hanna Corporation car for car, we would make about the same movement as we would on the team track.

Q. Well, would you require the same amount of time; would the expense be about the same, the operating expense substantially the same?

A. Yes, about the same per car."

This witness was not impeached nor was he discredited. His testimony was not refuted by any other witness called by the Commission. His testimony is the only testimony in the entire record showing a comparison between the

service rendered at appellant's plant and the service rendered for the public generally on team-tracks within the Buffalo district.

If the principles of industrial team-track spotting enunciated by the Commission in its General Report in *Ex Parte* 104 are sound, then the Commission must apply those principles to the facts developed at appellant's plant. If in cases of doubt a comparison between industrial switching and team-track switching is to be based upon the expert knowledge of a railroad operating witness that test has been met by the record in this case. The Commission has disregarded this evidence and has entered its finding that the service exceeds team-track spotting based, not upon the evidence, but only upon the Commission's expert opinion, which is contrary to the only evidence given in the case. This was erroneous. (*Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88).

Regardless of rules and definitions laid down by the Interstate Commerce Commission the appellant is as a matter of law entitled to the same quantity of transportation service furnished by the railroads to shippers on team-tracks. If as a matter of fact the spotting service at the appellant's plant does not exceed that at team-tracks in the Buffalo switching district, it does not become so by decision of the Commission in disregard of the facts. The Commission therefore cannot discard the testimony as to the facts relating to the nature and extent of team-track service and determine the appellant's right to service by the application of hypothetical conceptions of the nature and extent of team-track spotting.

4. The Commission has not determined in this case or in any case the extent and complexity of spotting service furnished shippers on team-tracks, which it has applied as a standard of measurement in this case.

In its *Ex Parte* 104 investigation the Commission did not take testimony as to the character, extent and complexity of car spotting on team-tracks, which it did, however, prescribe as the measure of the spotting service which may be furnished an industry. There was some testimony taken in the early stages of the proceeding as to the cost of spotting cars on team-tracks, and this showed a cost generally in excess of the cost of spotting cars at the appellant's plant under its present method of operation.

In the present case there was testimony, quoted partially above herein, developed by the Examiner for the Commission from a qualified, experienced railroad operating man on the character of team-track spotting service in the Buffalo switching district, which shows that the service at appellant's plant does not exceed team-track service. That evidence shows further that spotting a car on a team-track is not a simple, uninterrupted movement but frequently requires the carriers "to pull out cars to place your individual cars and then set them all up again." In addition to the multiple operations involved in a spotting of that sort, the simplest spotting of a car from a main line to a team-track manifestly requires also four stops to throw switches.

The appellees would supply the lack of evidence in the record as to the extent and complexity of team-track spotting by definitions furnished by their counsel on this motion. It seems needless to say that the record cannot be

eked out in that fashion. Even these definitions given by counsel tell us nothing of the extent and character of the maneuvers and movements of engines and cars entailed in such switching operations or the interferences, delays and interruptions encountered by the carriers in such movements. The Commission on the other hand, as has already been shown, recognized the difficulty in determining whether car-spotting on an industry's tracks exceeds team-track spotting, a difficulty which the Commission suggested could be met by an investigation by a qualified railroad operating man, although it rejected the proof of such an investigation in the present case.

The appellant contends that a finding by the Commission that the spotting in its plant exceeds the service rendered by the railroads in spotting cars on team-tracks and industrial Spur tracks, without receiving evidence and determining the extent and relative cost of spotting service on team-tracks, especially in the Buffalo switching district, is wholly arbitrary and without legal basis. The District Court has answered this contention by stating that it is unnecessary to determine the extent of service required in team-track spotting because the Commission has determined "what is in excess of team-track spotting." This, it is submitted, is a contradiction in terms. Without knowing the size and extent of the standard to be used as a comparison there can be no such thing as a determination of what exceeds the standard.

The appellant does not seek from the carriers any free service or any rebate, or any service in excess of that accorded by the carriers to shippers generally. It does, however, insist that it is entitled to have as much and as extensive service as is provided for shippers generally as a

part of line-haul transportation, and particularly for shippers who receive and ship their freight at public team-tracks in the Buffalo switching district. Under the decision rendered by the Commission the appellant has been deprived of that service.

The question here raised by appellant, of the absence of any determination of the extent of service involved in team-track delivery, which the Commission has used as a standard, has never been presented to or passed upon by this Court in any of the cases which have come before it for consideration, and the appellant is not precluded by any prior decisions from presenting it for determination in the present case. This issue, the appellant respectfully urges, is both substantial and important.

Conclusion.

From the brief review of the evidence taken by the Commission in this case, (necessarily not inclusive on this motion), and the discussion of the issues raised by the appeal, we believe it has been made apparent that the issues presented are substantial. It is respectfully submitted that the motion to affirm should be denied.

RALPH ULSH,
HARRY D. FENSKE,
JAMES McEVOY, JR.,
Counsel for Appellant.

APPENDIX.

Dissenting Opinion of Judge Burke.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK.

THE HANNA FURNACE CORPORATION,

vs.

UNITED STATES OF AMERICA, *et al.*

The order of the Commission must find support in the evidence on at least one of the following grounds: That the plaintiff's trestle would not support railroad locomotives, that opening and closing of switches would constitute interference, or that intra-plant operation would cause interruptions with car-spotting movements if conducted by the railroads. There is no evidence and no finding that the trestle would not bear the weight of railroad locomotives. There is no basis in precedent for sustaining such an order of the Commission on the ground that opening and closing of switches constitutes an interference in car-spotting movements. It is inherent in the operation. There is no evidence that the number of switches required to be opened or closed would be burdensome.

The plaintiff and its predecessor have for 21 years performed their own car spotting under an allowance from the railroads. The only evidence as to the manner of car spotting that was before the Commission related to how it had been done by the plaintiff under those circumstances. Plaintiff had the right to conduct those operations in its own way and suited best to its own convenience. It does not follow that it would have to be done in the same manner if

the service were performed by the railroads. The Commission had before it a map showing the layout of plaintiff's tracks and buildings and evidence as to the volume of car movements conducted within the plant. On that evidence it has based its finding that car spotting, if conducted by the railroads, "would be marked by frequent interruptions and delays occasioned by intra-plant switching interference." The only evidence on the question of possible interference with car spotting movements, if conducted by the railroads, was the testimony of Friederickson, assistant to plaintiff's general superintendent, who was competent to testify as to the requirements of the industry and he had knowledge of the way plaintiff's business was and could be conducted. He testified regarding the requirements and manner of operation of defendant's plant. He said that there would be no interference by intra-plant traffic with car spotting movements and explained that the plaintiff would not have to conduct its car movements at the same time and in the same location where the railroads would be performing car spotting service. The Commission has rejected this testimony. There is no more ground for holding that there would be interference on the basis of the Commission's expert knowledge, without evidence, than there would be for holding that the plaintiff's trestle would not support the weight of railroad switching engines on the basis of the Commission's expert knowledge, without evidence. In United States v. Pan American Petroleum Corp., 304 U. S. 156 the court pointed out that the Commission had before it maps exhibiting the character and extent of the plant trackage, its relation and accessibility to the main line tracks of the carriers concerned and proofs as to the volume and the nature of intra-plant movements, the amount of engine services required and other relevant facts. I take this to mean that, included in the proofs as

to the nature of intra-plant car movements and other relevant facts, there was evidence not only as to the materials being carried in intra-plant car movements but also as to the time when it was necessary in the industry to conduct such car movements.

I think the Commission's finding that car spotting, if conducted by the railroads, "would be marked by frequent interruptions and delays occasioned by intra-plant switching interference" is not supported by substantial evidence and is contrary to the only evidence on the subject in the case and, as such, is beyond the power of the Commission, I. C. C. v. Louisville and Nashville Railroad Co., 277 U. S. 88. I would give judgment for the plaintiff.

Dated: December 3, 1943.

HAROLD P. BURKE,
United States District Judge.

In the District Court of the United States for the Western District of New York

CIVIL ACTION No. 1408

THE HANNA FURNACE CORPORATION, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees United States and Interstate Commerce Commission,[1] pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[2] entered January 11, 1944, of a specially constituted court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission. The Commission's order, dated November 11,

[1] Certain railroads are also defendants-appellees.

[2] The District Court also entered a written opinion (District Judge Burke dissenting) as well as findings of fact and conclusions of law.

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1942, prohibited payment of an allowance to appellant by appellee rail carriers for switching service performed by appellant within its pig-iron plant at Buffalo, New York. An appeal to this Court was allowed March 6, 1944, and the appeal papers were served upon these appellees on March 8, 1944.

The Court, in view of the recent argument before it of *United States* v. *Wabash R. Co.*, No. 453, this Term, is no doubt thoroughly familiar with the setting of such terminal service cases as the present one. In 1931, in *Ex Parte 104*, 209 I. C. C. 11, the Commission on its own motion instituted an extensive general investigation relating to the payment of allowances to industries for the performance of terminal switching. The Commission there reached the general conclusion that when a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, due to interruption or interference by the desires of an industry or the disabilities of its plant, the service beyond such point of interruption or interference is in excess of that performed in simple switching or team-track delivery.[1] It further concluded that

[1] "Simple switching delivery" and "team-track delivery" are well understood terms in the lexicon of commerce law. The former means placing a car on a siding leading to a plant. The latter means putting cars on a spur belonging to a railroad to which there is access by wagons or other conveyances, and in this type of switching the unloading must be made at the convenience of the railroad.

services beyond that point were in excess of the carriers' transportation obligation under their line-haul rates and that the performance of such services by the carriers under such rates, or the payment by them of allowances to shippers for the performance of such services by the latter, was an unlawful rebate in violation of Section 6 (7) of Part I of the Interstate Commerce Act (49 U. S. C. 6 (7)).

In supplemental reports under *Ex Parte 104*, 209 I. C. C. 11, the Commission has since applied these general principles to the particular facts at many individual plants. Its orders condemning allowances on this theory have come before this Court on numerous occasions and have been uniformly sustained,[4] and the standards enunciated in *Ex Parte 104* are therefore no longer open to attack. The Commission's present report (253 I. C. C. 613) ordering the discontinuance of the allowance of appellant's plant is merely another of these supplemental reports (the 67th).

The Commission's report describes in detail the situation with respect to the switching of inbound and out-bound line-haul traffic at appellant's plant, which is presently performed by appellant under an allowance from the railroad appellees

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[4] *United States* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Co.* v. *United States*, 301 U. S. 669; *A. O. Smith Corp.* v. *United States*, 301 U. S. 669; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156; *Inland Steel Co.* v. *United States*, 306 U. S. 153.

of 90 cents per loaded car. It points out that in addition to such switching, appellant performs over the same tracks a large amount of purely intra-plant switching, and frequently intermingles line-haul cars with purely intra-plant units. It states that "the record is persuasive that railroad switching of the line-haul cars in the plant would be marked by frequent interruptions and delays occasioned by intra-plant switching interference, as well as the numerous stops to open and close switches incident to operations over so extensive a network of plant tracks." It further states that from the evidence concerning the extent and character of line-haul switching operations on appellant's complex system of industrial tracks, it was evident that such service was in excess of team-track or simple switching delivery. The Commission concluded that the transportation service which the railroad appellees were obligated to perform under their line-haul rates began and ended at the interchange tracks, described of record, and did not include the switching service beyond that point now performed by appellant under this allowance. The Commission further concluded that by means of the allowance made by the railroad appellees to appellants, the railroads were remitting a portion of their line-haul transportation rates in violation of Section 6 (7) of Part I of the Interstate Commerce Act.

The only issue decided by the District Court and now before this Court is whether the Commis-

sion's conclusion that the carriers' line-haul obligation at appellant's plant began and ended at the interchange tracks and did not include switching within the plant, was justified.[5] It is settled beyond doubt by decisions of this Court that the determination as to where transportation ends is a factual one for the Commission rather than for the courts, and that its conclusion must be sustained if suported by substantial evidence. *United States* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402, 409–411; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, 158; *Swift & Co.* v. *United States*, 316 U. S. 216, 225, 231; *Interstate Commerce Commission* v. *Hoboken Mfrs. R. R. Co.*, No. 43, this Term, pamphlet p. 7.

The District Court painstakingly reviewed the evidence before the Commission.[6] It concluded that there was substantial evidence to support the Commission's finding that railroad line-haul switching in appellant's plant would be subject to interruption and interference. Under the now unassailable standards set forth in *Ex Parte 104*, 209 I. C. C. 11, it further concluded that the Com-

[5] The issue as to whether the Commission must properly require cessation of unlawful terminal switching practices at plants of all competitors simultaneously to prevent discrimination and preference, raised in *United States* v. *Wabash R. Co.*, No. 453, this Term, is not here presented.

[6] This included considerable evidence relating to appellant specifically taken at the original general hearing in *Ex Parte 104*, 209 I. C. C. 11, as well as the record made in the 67th supplemental proceeding dealing with appellant in particular.

mission's conclusion that line-haul transportation did not include such switching, was justified. It is submitted that the District Court's decision was clearly right, that the present appeal presents no substantial question, and that the decision should therefore be affirmed without argument.

From the Court's decision, it appears that the Commission had before it a blueprint showing in detail appellant's extensive plant buildings and facilities; a network of 66 railroad tracks, 14 miles in total length, connecting directly or indirectly with these buildings; and six separate points where materials were loaded and unloaded. There was also evidence that intra-plant switching[1] was extensive and much greater in extent than line-haul switching. For instance, during the first six months in 1930, "fairly comparable with the like period in 1942," 12,875 cars were switched in intra-plant service and 2,306 in line-haul service. An average of 113 loaded cars was switched daily, and there were altogether several hundred switch movements daily. Switching was done 24 hours a day, one of seven locomotives employed being constantly in use. There was, as the Court stated, no direct evidence concerning the movement of particular materials in intra-plant switching from the unloading points to the places

[1] Gondola and hopper cars owned by appellant and, to some extent, freight cars owned by the railroad are used in the intra-plant switching.

where utilized.[8] But there was, as the Court held, abundant circumstantial evidence from which the Commission could properly conclude what these intra-plant switching movements were, and that the intra-plant switching would prevent the railroads from doing the line-haul switching at their ordinary operating convenience without interruption or interference. The location of the buildings and tracks (obvious from the blueprint), the extent of the intra-plant switching, the nature of the materials, and the plant products were referred to in this connection.[9] There are numerous other indications in the evidence, mentioned by the Court, that intra-plant and line-haul switching, if done respectively by the appellant and the railroads separately, would interfere with each other. For example, it appears that both kinds of cars are presently intermingled; that appellant preferred to do the line-haul switching itself despite the fact that such switching cost it $1.73 per car, and it received an allowance of only 90¢ per car from the railroads; and that this switching would be much more costly to the railroads than switching in their own yards.

[8] There was, however, direct evidence as to switching movements made with respect to the line-haul cars.

[9] As the Court properly stated: "We believe there is little in the decisions in these cases [the Commission's decisions considered in the *Tin Plate* case] showing specifically what the intra-plant movements were, but there, as here, the conclusions in this respect have been largely drawn from description of the nature of the industry, the layout of its tracks, and the extent of operations over there. * * *"

The only testimony that intraplant switching would not interfere with line-haul switching was by appellant's witness Frederickson. But, as the District Court stated, "The most liberal construction that can be placed upon his testimony is that by the stoppage of intraplant cars in movement deliveries could be made to certain spotting points without interference." He was speaking concerning a hypothetical mode of operation which had never been adopted at this plant. This was the language of hope[10] rather than of experience which the Commission was entitled to weigh and to refuse to accept at face value.[11]

For the foregoing reasons, it is evident that no substantial question is presented by this appeal. It is respectfully submitted that the judgment of the District Court should be affirmed.

(S.) CHARLES FAHY,
Charles Fahy,
Solicitor General.

(S.) DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel,
Interstate Commerce Commission.

MARCH 1944.

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[10] Cf. *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana*, 251 U. S. 396, 400.

[11] "The value and weight of the evidence given by railroad and plant executives and the inferences to be drawn from it were for the Commission." *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, 158.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above motion to affirm upon each of the following named counsel by mailing them a copy thereof this 17th day of March, 1944:

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SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 132

THE HANNA FURNACE CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
THE BALTIMORE AND OHIO RAILROAD
COMPANY, et al,
Appellees.

Appeal from the District Court of the United States
For the Western District of New York

PETITION FOR REHEARING

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CAPITOL PRINTING CO., LAW PRINTERS, DETROIT, MICH.

SUPREME COURT OF THE UNITED STATES

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COMPANY, et al,
Appellees.

Appeal from the District Court of the United States For the Western District of New York

PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I

This petition is filed by the appellant, The Hanna Furnace Corporation, for the purpose of obtaining a rehearing of an order entered granting a motion to affirm the judgment of the District Court pursuant to the provisions of Rule 7, paragraph 4.

The rule provides that a motion to affirm will be received "on the ground that it is manifest that the appeal was taken for delay only or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." The appellees have not claimed that the appeal was taken for the purpose of delay and a delay in the decision of this cause would be of no benefit

to appellant because payment of the allowance hereinafter described is being withheld by the railroads pursuant to an order of the District Court, pending the decision of this case.

We shall direct ourselves therefore, only to showing that the questions are not unsubstantial and do need further argument.

II

This cause was instituted before a three-judge District Court to set aside an order of the Interstate Commerce Commission. The same act which provides for the hearing in the District Court provides for a direct appeal as of right to this court from the decision of the District Court. The statute is the Urgent Deficiencies Appropriations Act of October 22, 1913 (Title 28, U. S. Code, Section 47).

This motion is not filed as the last struggle of the loser in a contest but is presented to the court in the sincere belief that in granting the motion to affirm, without permitting appellant to present the case on the complete record and with a full hearing, the court has done appellant a grave and a serious injustice because the questions involved in this appeal can only be determined by an examination of the record and not by reference to prior decisions. It is only such belief that leads us to trespass on the time of the court with this motion for rehearing.

The court's order forces us to the conclusion that the court has adopted the assertion set forth in the appellees' motion to affirm, that "The Commission's present report (253 I.C.C. 613) ordering the discontinuance of the allowance of appellant's plant is merely another of these supplemental reports (the 67th)," and has inferred that this

appeal is without merit because of the prior decisions affirming the Commission's orders in other cases.

The disposition of this case on a motion to affirm is directly opposed to the rule laid down by this court, that where the question is the existence of substantial evidence to support the Commission's order each case must be determined on its own facts.

> *United States v. Wabash Railroad Company, et al.*, 321 U. S. 403, 407-408.
>
> *United States v. American Sheet and Tin Plate Company, et al.*, 301 U. S. 402, 411.

We do not question the power of the court to grant the motion to affirm in this case. However, the Congress has granted to the appellant a specific right of direct appeal on the merits. Among the questions reviewable in this court is the fundamental question of whether the order of the Commission is sustained by substantial evidence without which it can have no validity. It would seem, therefore, that since the principal question involved is whether or not there is any substantial evidence to support the decision of the Commission, whose decision on the facts, if supported by substantial evidence, is conclusive, and where the lower court divided on that very question, the disposition of this case on a motion to affirm in effect denies the appellant the appeal which the statute gives it. The slightest doubt of the correctness of the decision of the lower court should induce this court to deny the motion to affirm and permit a full presentation of the case on the merits.

We have made a careful analysis of all of the decisions of this court under Rule 7, paragraph 4. In the only cases

where the court has discussed the application of the rule the court has held that a motion to affirm should only be granted,

> "* * * where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by the Court as to absolutely foreclose further contention on the subject." *Equitable Life Assurance Society v. Brown*, 187 U. S. 308.

III

The appellant is not questioning the correctness of any prior decision of this court arising out of the Ex Parte 104 proceeding. Appellant recognizes that the rules for the determination of the questions involved in this appeal have been announced by this court on several occasions, and that those rules must be considered as governing the decision in this case.

The appellant contends, however, that the order of the Commission under review denies appellant the measure of transportation service to which it is entitled under the decisions of this court and the general rules pronounced by the Commission itself.

The Commission has recognized that under normal conditions the American freight rate contemplates delivery of the car at the point where it can be conveniently loaded or unloaded. The rule is well stated in the *American Sheet*

and Tin Plate Company case, 301 U. S. 402 (409), as follows:

> "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits.' Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur tracks owned by an industry. The practice has come to be uniform that in delivering a car on a team track the carrier will spot the car at a point where merchandise of the class contained in the car is usually and most conveniently unloaded; thus there are particular team tracks or points where fruit and vegetables, furniture, etc., etc., are constantly loaded and unloaded and cars are spotted accordingly. In the analogous situation where an industry's warehouses or other facilities are located at given points on a spur or sidetrack, the carrier holds itself out to spot the car at the point where it is needed for loading or unloading, as a warehouse door, a scrap pile, etc., etc."

The Commission held generally in its main report in Ex Parte 104 (209 I.C.C. 11) that no private industry should receive any greater or more extensive service than the railroads offered to the public generally on team-tracks owned and operated by the carriers. The Commission did not attempt to determine the extent of team-track service but it found that if certain conditions did exist then the service on private sidetracks exceeded team-track service. These conditions were: (1) physical disability of the industrial plant tracks such as narrow gauge track, severe curves over which carrier power could not operate or other unsafe or hazardous conditions, (2) the refusal of the industry to accept the service if proffered by the carrier, yet at the same time maintaining that it was entitled to an allowance,

and (3) interruption or interference from plant locomotives or operations if the carrier were to perform the service. As examples of what constituted plant interruption or interference, the Commission attached to its report certain rules that had been promulgated by The Traffic Executive Association, Eastern Territory.

The Commission's main report was followed by supplemental reports which dealt with the conditions at certain specific industries, including appellant's.

The Commission has specifically approved the payment of allowances at certain industrial plants:

Pacolet Manufacturing Company, Operating Allowance, *Ex Parte* 104, 210 I.C.C. 475;

Chiloquin Lumber Company, Terminal Allowance, *Ex Parte* No. 104, 241 I.C.C. 495;

Lamm Lumber Company, Terminal Allowance, *Ex Parte* No. 104, 245 I.C.C. 575;

Silver Falls Lumber Company, Terminal Allowance, *Ex Parte* No. 104, 245 I.C.C. 509;

Pittsburgh Steel Company, Terminal Allowance, *Ex Parte* No. 104, 241 I.C.C. 562;

Celotex Company, Terminal Allowance, *Ex Parte* No. 104, 245 I.C.C. 105;

Snoqualmie Falls Lumber Company, Terminal Allowance, *Ex Parte* No. 104, 245 I.C.C. 112;

Interlake Iron Corporation, Duluth, Minnesota, Terminal Allowance, *Ex Parte* No. 104, 245 I.C.C. 437;

J. Niels Lumber Company, Terminal Allowance, *Ex Parte* No. 104, 248 I.C.C. 283.

The Commission has specifically held that the mere fact that a carrier has never performed completed car spotting service at a given plant is not indicative of the obligation of the carrier to perform such service. *Silver Falls Timber Company,* Terminal Allowance, 245 I.C.C. 509, wherein the Commission said:

> "Manifestly the fact that respondent herein never performed the switching service to and from the loading and unloading points within the plant of the industry is not determinative of the question as to whether this is a transportation service to which the industry is entitled under the line haul rates without charge."

In its main report in Ex Parte 104, the Commission quoting with approval from the Car Spotting Charges case (34 I.C.C. 609), said:

> "The mere size or complexity of the industry is not controlling in determining whether or not the line haul rate covers the receipt or delivery of freight at the door of the plant."

Some of the supplemental reports and orders of the Commission have been reviewed by this court.

The first case was *United States v. American Sheet and Tin Plate Company, et al.,* 301 U. S. 402. In that case the court decided that under Section 1 of the Interstate Commerce Act, the Commission has the power to determine what is embraced within the service of transportation and what lies outside of that service, and the power to enjoin the performance of any additional service or the making of an allowance to the industry which performs it. The court held that the findings of the Commission were adequate, and, if supported by substantial evidence, sufficient

to sustain the orders made. The court then examined the evidence in each case and held that the findings in respect to the individual plants were supported by substantial evidence. The court pointed out that each case must be determined upon the circumstances disclosed at each industrial plant.

In *United States v. Pan American Petroleum Corporation, et al.*, 304 U. S. 156, one of the cases cited by the court in granting the motion to affirm, the court pointed out that the appellees asserted that the Commission exceeded the powers conferred upon it by the Interstate Commerce Act. These contentions were the same considered by the court in the *American Sheet and Tin Plate* case, and the court properly held that appellees as to those contentions were foreclosed by the court's prior decision.

Notwithstanding, the court then proceeded to examine the record before the Commission and found that each order had been supported by substantial evidence.

The second case cited by the court in support of granting the motion to affirm is *United States v. Wabash Railroad Company, et al.*, 321 U. S. 403. In that case the court reaffirmed the principle that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts *if supported by evidence.* The court, after quoting from the main report of the Commission in Ex Parte 104 the test the Commission therein prescribed, said (page 407):

> "The application of such a test obviously requires an intensive study of traffic conditions prevailing at

> the particular plant at which the spotting service is rendered."

The court then examined at length the evidence as to the industrial plant involved in that case and concluded that it did support the findings made by the Commission.

The Commission's order involved in this appeal directed the carriers involved to cancel the terminal allowance tariffs in effect for upwards of twenty years, paying to appellant ninety cents per car for the switching of cars at appellant's plant in Buffalo, New York, for the account of the carriers. The basis of the Commission's order was that the carriers, if they were to perform the service for which they were paying appellant the allowance, would encounter frequent interruption or interference from plant operations, and therefore the payment of the allowance amounted to a preference under Section 6 (7), Interstate Commerce Act. The appellant contends that there was no substantial evidence to support the finding of interference made by the Commission and that in the absence of substantial evidence the order of the Commission is invalid and arbitrary.

It is difficult to understand how the decisions of this court in either the *Pan American Petroleum Corporation* case or the *Wabash Railroad Company* case can be conclusive as to whether or not the evidence before the Commission supports its findings in this case. A determination of this question can only be made from an examination of the record before the Commission.

IV

A basic feature which distinguishes the cases passed upon by this court, in which the switching service involved was held to exceed that rendered for shippers generally

on industrial sidetracks or team-tracks, was the double movement required by first placing the cars on inter-change tracks and, later, at the convenience of the industry, switching them to points of loading or unloading. This was emphasized in the case of *United States v. Wabash Railroad Company*, 321 U. S. 403, where the court said that the controlling question was whether the movement from the inter-change tracks to points of loading and unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team-track or siding. This double movement was present in all the cases passed upon by this court.

But, in contrast, the appellant does not require cars to be delivered on inter-change tracks and subsequently moved to points of loading and unloading. There are only seven points in appellant's plant where cars are spotted for loading or unloading. The Commission has found that every one of these points is readily accessible to the carrier's rails and can be reached by direct movement from the connecting tracks of the carriers, and that, subject to opening and closing the necessary switches, the movements are simple movements, provided there is no interference from plant operations.

The crucial question, in view of these findings of the Commission, is whether the Commission's conclusion that spotting cars by the railroads to these points over these tracks would be met by interruptions and interferences from plant operations, is supported by substantial evidence. If not, the other findings of the Commission requires an annulment of its order.

The appellant contends, and Judge Burke in the District Court held, that not only is there no evidence to support

the Commission's finding that there would be interference, but that the finding is contrary to the only evidence in the case on the subject. A determination of this contention cannot be made by reference to any other decided case as a precedent, but only from an examination of the record in this case.

V

Appellees in their motion assert that the only question before the District Court and before this court is whether or not there was any substantial evidence to support the findings of the Commission. If this is the only question involved and if, as appellees assert, the decision of the District Court "was clearly right, that the appeal presents no substantial question, and that the decision should therefore be affirmed without argument" it should not have been difficult for appellees to point out some bit of testimony or evidence which they claim supports the decision of the Commission. Yet, the appellees simply review the conclusions reached by the Commission and the comment on the evidence in the prevailing opinion of the District Court.

A great deal of the comment on the evidence in the prevailing opinion consists of statements in respect to suppositious findings which it was said the Commission might have made. The District Court has no more right to usurp the fact-finding power of the Commission to support its order than to annul it. Findings actually made by the Commission must determine the validity of its order. Many operations within the plant discussed by the District Court have no bearing on the question of interference because there is no evidence in the record as to the nature, or the time, or the extent of such operations or the locations

within the plant where they are conducted. The Commission made no findings in respect thereto and none can be made by the courts.

The appellees dismiss the only direct evidence on the question of interference, the testimony of witness Frederickson, with this statement:

> "He was speaking concerning a hypothetical mode of operation which had never been adopted at this plant. This was the language of hope rather than of experience which the Commission was entitled to weigh and to refuse to accept at face value."

It is conceded that the carriers never performed the service within appellant's plant. The question before the Commission was whether or not if the carriers were to perform the service it could be done within the principles of industrial sidetrack spotting announced by the Commission in its general report (209 I.C.C. 11) and approved by this court. Witness Frederickson was the only witness called to testify as to the requirements of the industry, the nature of its business and the extent and character of the spotting service that would be required. All of the "circumstantial evidence" referred to by the District Court and here relied upon by the appellees in their motion to affirm was elicited from witness Frederickson. The only other evidence was the blueprint. Witness Frederickson introduced this blueprint and described it in detail. He testified as to the number of tracks, the length thereof, the points where materials are loaded and unloaded, the extent of plant and line-haul switching, the number of cars handled during the test period, the hours the plant operates and the number of switch engines used by appellant. He testified that because of the plant layout and the use of particular tracks in his opinion no interference with carrier

operation would occur. He further testified that if the carriers performed the service there would be no need to use the present inter-change yard as all of the points of loading and unloading were directly accessible to the rails of the line-haul carriers, and the Commission so found in its report.

Yet the Commission rejects his evidence on interference and in its place substitutes its conclusions that interference must of necessity occur.

Appellant asserts that Judge Burke's treatment of this point was correct:

> "The only evidence on the question of possible interference with car spotting movements, if conducted by the railroads, was the testimony of Frederickson, assistant to plaintiff's general superintendent, who was competent to testify as to the requirements of the industry and he had knowledge of the way plaintiff's business was and could be conducted. He testified regarding the requirements and manner of operation of defendant's plant. He said that there would be no interference by intra-plant traffic with car spotting movements and explained that the plaintiff would not have to conduct its car movements at the same time and in the same location where the railroads would be performing car spotting service. The Commission has rejected this testimony. There is no more ground for holding that there would be interference on the basis of the Commission's expert knowledge, without evidence, than there would be for holding that the plaintiff's trestle would not support the weight of railroad switching engines on the basis of the Commission's expert knowledge, without evidence."

The only other witnesses called by the Commission in this proceeding were representatives of the carriers. Their

testimony is briefly reviewed on pages 10, 16 and 17 of appellant's brief opposing appellees' motion to affirm heretofore filed with the court. It is sufficient to reiterate that their testimony corroborated Frederickson's and did not refute it.

Appellees in their motion say:

> "For example, it appears that both kinds of cars are presently intermingled; that appellant preferred to do the line haul switching itself despite the fact that such switching cost it $1.73 per car and it received an allowance of only 90c per car from the railroads; and that this switching would be much more costly to the railroads than switching in their own yards."

As to the intermingling of cars, Frederickson testified that this was done as a matter of convenience under present operations but that if the carriers were to perform the service there would be no need to intermingle plant cars and line-haul cars. As Judge Burke said:

> "Plaintiff had a right to conduct those operations in its own way and suited best to its own convenience. It does not follow that it would have to be done in the same manner if the service were performed by the railroads."

There was no evidence that appellant preferred to do the line-haul switching itself. On the contrary, the evidence shows that it made no difference to appellant whether it received the allowance or the carriers performed the service (See page 5, appellant's brief in opposition to motion to affirm).

The evidence on the question of cost to the carriers was that it would cost them more to perform the switching

service at appellant's plant than to pay the allowance, but that the cost of spotting cars at appellant's plant would be about the same, car for car, as in their own yards. (See testimony of witness Haines, quoted on pages 15-18 of appellant's brief in opposition to motion to affirm.)

VI

If, as appellant contends, the decision of Judge Burke is right and that of the majority of the lower court wrong, a grave injustice will be done by this court in refusing to review the case merely because the court has found in each terminal allowance case heretofore reviewed that the Commission had before it substantial evidence upon which to base its findings. On the authority of the statements of this court that each case must be decided on its own record, appellant believes that it is entitled to have the record in this case reviewed, not because the appellant seeks to have the court reconsider any principle of law announced in the other cases, but because the appellant contends that the Commission has refused to apply these principles to its case and has arbitrarily, without evidence, entered its order cancelling the tariffs here involved.

Petitioner prays that the court will reconsider its order granting the motion to affirm.

Respectfully submitted,

RALPH ULSH,
Attorney for Appellant.

HARRY D. FENSKE,
JAMES McEVOY, JR.,
Of Counsel.

Dated at Buffalo, New York,

October....., 1944.

AFFIDAVIT

I, Ralph Ulsh, attorney for petitioner, The Hanna Furnace Corporation, certify that the foregoing petition is presented in good faith, is true and correct, and is not filed for delay.

RALPH ULSH.

No. 132. HANNA FURNACE CORP. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Western District of New York. October 9, 1944. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *Pan American Corp.*, 304 U. S. 156, 158; *United States* v. *Wabash R. Co.*, 321 U. S. 403. *Messrs. Ralph Ulsh, Harry D. Fenske,*

and *James McEvoy, Jr.* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al., appellees. Reported below: 53 F. Supp. 341.